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6 SW  
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8 In the United States District Court  
for the Northern District of California  
9

FILED *mjh*

AUG 06 1996

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE

170

10 ROGER SCHLAFLY, Plaintiff ) Case C-94-20512 SW PVT  
v. )  
11 PUBLIC KEY PARTNERS, and ) Summary Judgment Validity  
RSA DATA SECURITY INC., Defendants. ) Motion Opposition  
12 and )  
13 RSA DATA SECURITY INC., Plaintiff ) Case C-96-20094 SW PVT  
v. )  
14 Cylink, Caro-Kann, and Stanford ) Sept. 4, 1996  
15  
16  
17  
18

19 Schlaflly opposes Cylink's three recent motions for summary judgment  
20 on the validity of the Stanford patents. They raise no new issues,  
21 and only interfere with our schedule.  
22

23 Case history

24 Last year, Schlaflly filed a motion to invalidate the Diffie-  
25 Hellman, Hellman-Merkle, MIT, and Schnorr patents. Cylink filed a  
26 motion to have the Stanford patents declared valid. There was a  
27 hearing on Dec. 6, 1995. The Court has not explicitly ruled on  
28 either motion.

1  
2 In its later denial of a Cylink motion for preliminary injunction,  
3 the Court implied that it needs to see more evidence to decide  
4 validity of the Stanford patents. Cylink then lobbied for a quick  
5 hearing on claim construction, followed by a trial. But now Cylink  
6 argues that there are virtually no claim construction issues under  
7 dispute, and no material facts under dispute, so the patents  
8 should be found valid by summary judgment.

9  
10 Cylink's motions

11  
12 On the eve of the Stanford patent hearings, Cylink now makes three  
13 motions, two to rehash validity arguments already made, and one to  
14 foreclose Schlaflfy from making additional arguments.

15  
16 Cylink's memos are such nonsense, that it is hard to see what it  
17 is trying to accomplish. Is it trying to squirm out of the trial  
18 it just asked for? Does it think that just because there are two  
19 plaintiffs, it gets two shots at every argument? Is this a plan  
20 to overload the RSADSI lawyers who have vacations planned this  
21 month? Is it hoping that the Court forgot the flaws in Cylink's  
22 arguments?

23  
24 Cylink says it does not seek to reopen old pending issues, but  
25 then proceeds to do exactly that. It says that patents are  
26 presumed valid by law, but then fails to explain why it needs this  
27 Court to say that the Stanford patents are presumed valid. It says  
28 that it need not introduce evidence, and then files hundreds of

1 pages of documents. It says that there are no material facts in  
2 dispute, but does not (yet) supply a joint statement of undisputed  
3 facts. It asked for a Markman hearing and a validity trial, but  
4 then pretends that these are unnecessary.

5

6 Bad timing

7

8 Cylink's timing is unusual, if not downright disruptive. We have  
9 a Markman hearing starting on Sept. 4, to be followed by a speedy  
10 trial on the validity issues. The whole purpose of the Markman  
11 hearing is to narrow the legal issues involved. Cylink ought to  
12 be willing to wait for that resolution, and then argue for summary  
13 judgment based on the Court's claim construction.

14

15 Issues already briefed

16

17 Cylink's motion rehashes arguments already briefed. It duplicates  
18 arguments made against my motion for partial summary judgment, and  
19 in its own motions for patent validity and preliminary injunction.  
20 RSADSI and I have already answered them.

21

22 In particular, Cylink's argument that "enablement is tested as of  
23 the patent filing date" is rebutted by my briefs filed for the  
24 Dec. 6, 1995 and Feb. 29, 1996 hearings. Cylink ignores In re  
25 Wright, 999 F.2d 1557, 27 USPQ2d 1510 (Fed Cir 1993), which is  
26 more recent and on point than its citations. Even Cylink's own  
27 citations do not support its positions, and I hope the Court reads  
28 them. For example, Cylink relies heavily on In re Hogan 559 F.2d

1 595 (CCPA 1997), quoting it as "enablement was established for all  
2 time ...". The full sentence includes the phrase "considering all  
3 available evidence (whenever that evidence became available)".  
4 There was no debate over whether the Hogan patent enabled one to  
5 make the claimed invention, but rather whether the breadth of the  
6 claims was commensurate with the specification, an entirely  
7 different issue. (See also US Steel v. Philips, 865 F.2d 1247  
8 (Fed Cir 1989) where the same issue was raised in litigation of  
9 the Hogan patent. The analogous issue in our case would be for  
10 RSADSI to argue that Hellman-Merkle's broad claims should not  
11 cover the RSA invention because the specification does not  
12 anticipate RSA. Then Cylink could reasonably cite Hogan in  
13 rebuttal.) A full reading actually weighs in favor of admitting  
14 evidence about the breaking of the trapdoor knapsack. Evidence of  
15 non-enablement is relevant "whenever that evidence became  
16 available".

17  
18 Likewise, Cylink's "printed publication" arguments have also been  
19 rebutted. Cylink cites a list of cases that upheld patents under  
20 35 USC 102(b) challenges, but not one of them involved an enabling  
21 disclosure to the public before the critical date. For example,  
22 the oral disclosure in Howmedica was not enabling, and the  
23 documents in Northern Telecom were marked "not for public  
24 release".

25  
26  
27  
28

1       Cylink violates the spirit of case consolidation order

2  
3       The Court consolidated the Schlafly and RSADSI challenges to the  
4       Stanford patents for the obvious judicial efficiency of having a  
5       unified trial on the validity. But Cylink attempts to divide the  
6       plaintiffs by directing one motion at Schlafly, and two motions at  
7       RSADSI. The apparent purpose of this maneuver is to repeat  
8       arguments against RSADSI which did not fly when they were made  
9       against Schlafly. Cylink should wait for the consolidated trial  
10      to argue validity.

11  
12     I can understand Cylink's impatience with the progress of this  
13     case. I would like to see it moving faster myself. But I did not  
14     think it was proper to just keep filing the same summary judgment  
15     motions over and over.

16  
17     Our agreed-upon plan of action is to decide claim construction,  
18     and then validity. The Markman decision permits doing it the  
19     other way around, at the discretion of the judge, but that is not  
20     what Cylink proposed, and that is not what we all agreed to.

21  
22     Declaration of validity is meaningless

23  
24     Patents are presumed valid, as a matter law. We do not need an  
25     order from the Court to affirm 35 USC 282. Plaintiffs have a  
26     challenge to the patents waiting to be tried. It is totally  
27     meaningless for the Court to declare them valid while we are  
28     waiting for trial.

1   Argument foreclosure attempt

2  
3   Cylink's motion against Schlafly attempts to foreclose Schlafly  
4   from making any additional invalidity arguments. No justification  
5   is given.

6  
7   Schlafly acknowledges that he has already put his best arguments  
8   forward. It would be very strange to shut the door on invalidity  
9   arguments on the eve of a Markman hearing. I have based my  
10   arguments on what I believe to be the proper claim construction of  
11   the patents, but if the Court adopts a different claim  
12   construction, then it may bring other invalidity arguments into  
13   play. Cylink has not even presented its claim construction yet.  
14   It is entirely possible, and maybe even likely, that I will attack  
15   Cylink's claim construction as indefinite, overbroad, or both. If  
16   Cylink prevails with its claim construction, then I will want to  
17   modify my invalidity arguments accordingly.

18  
19   Cylink's maneuver implies that I am under some sort of requirement  
20   to put forward all of my invalidity arguments right now. I  
21   believe this is incorrect as a matter of law. I have a motion for  
22   summary judgment pending. In that motion, I obviously made my  
23   best arguments, but there is no necessity to make all of my  
24   arguments. If and when that motion gets shot down, I am entitled  
25   to introduce new evidence or make new arguments. Cylink cannot  
26   presume otherwise, and certainly cannot get a "summary judgment",  
27   the only effect of which would be to limit my evidence and  
28   arguments in the upcoming trial to that which I presented in my

1 Dec. 6, 1995 motion.

2  
3 I do not wish to give the impression that I am trying to hold back  
4 evidence or arguments. Actually, I revealed all of my evidence  
5 and arguments in my complaint over two years ago. Some additional  
6 evidence has trickled in, and I have always made it promptly  
7 available. If Cylink wants to ask for an early discovery cutoff  
8 and trial date, then I am all in favor of it as long as it is  
9 binding on all the parties. But Cylink is trying to use a summary  
10 judgment motion as a mechanism for freezing my legal position  
11 without freezing the other parties, and that is not what summary  
12 judgment motions are for.

13

14 Facts in dispute

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16 I am happy to hear that Cylink says that no facts are in dispute  
17 -- but if this were true, why are we having a trial? I will  
18 confer with Cylink to prepare a joint statement of undisputed  
19 facts. I will propose the following facts, each of which has  
20 solid and unrebutted evidence on the record. If these do not show  
21 up in a joint statement (with perhaps some descriptive  
22 qualifiers), then you will know that they are disputed.

23

24 \* The August preprint was enabling.

25

26 \* Each of the three oral disclosures was enabling.

27

28 \* The August preprint was distributed in August 1976.

1 \* None of the early disclosures had an explicit confidentiality  
2 condition, except the IEEE journal submission.

3  
4 \* The trapdoor knapsack has been broken.

5  
6 \* The patent disclosures do not enable signatures.

7  
8 If Cylink disputes these facts, then I suspect we will have to  
9 make a determination at trial.

10  
11 Conclusion

12  
13 Cylink's motions contribute nothing to an orderly resolution of  
14 the issues. Schlafly requests that the Court deny the motions,  
15 and proceed with a Markman hearing on Sept. 4 and a validity trial  
16 this fall. At best, Cylink's papers just give a statement of  
17 where it stands on the Stanford patents, and remind us that it is  
18 anxious about its patents expiring.

19  
20  
21 Dated: Aug 5, 1996  
22

23 By: Roger Schlafly  
24

25  
26 Plaintiff, Roger Schlafly, Pro Se  
27

1 CERTIFICATE OF SERVICE  
=====

2 Schlaflfy v. Public Key Partners and RSA Data Security Inc.  
3 Case No. C-94-20512-SW, (PVT).  
4 Filed on July 27, 1994, San Jose, Calif.

5 The undersigned hereby certifies that he caused a copy of:

6 Summary Judgment Validity Motion Opposition  
7 to be served this date by First Class Mail upon the  
8 persons at the place and address stated below which is  
9 the last known address:

10 Thomas R. Hogan  
11 60 S Market St Ste 1125  
12 San Jose, CA 95113

13 Thomas E. Moore  
14 Tomlinson et al  
15 200 Page Mill Rd  
16 Palo Alto, CA 94306

17 Jana G. Gold  
18 Morrison et al  
19 755 Page Mill Rd  
20 Palo Alto, CA 94304

21 Robert D. Fram  
22 Heller et al  
23 525 University Ave  
24 Palo Alto, CA 94301

25 and to be emailed to the following:

26 Patrick Flinn, pflinn@alston.com  
27 Jana Gold, jgold@mofo.com  
28 Julie Mar-Spinola, jmarspinola@hewm.com

29 I declare under penalty of perjury under the laws of the State  
30 of California that the foregoing is true and correct.

31 Executed in Soquel, Calif. at the date below.

32 Dated: Aug 5, 1996

33 By: Roger Schlaflfy

34 Plaintiff, Roger Schlaflfy, Pro Se